The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 63 (2013) Article 14

Three Theories of "Principles of Fundamental Justice"

Nader R. Hasan

Three Theories of "Principles of Fundamental Justice"

Nader R. Hasan*

I. INTRODUCTION

No section of the *Canadian Charter of Rights and Freedoms*[1] has generated more controversy than section 7. The open-textured rights protected under section 7 — "life, liberty and security of the person" — and their equally open-ended qualifier — the "principles of fundamental justice" — have been a source of both optimism and confusion for litigants and scholars alike.[2] Even justices of the Supreme Court of Canada have candidly admitted that the ambit of section 7 "remains difficult to foresee".[3]

---

* The author is a partner at Ruby Shiller Chan Hasan, Barristers and an adjunct professor at the University of Toronto Faculty of Law. The author thanks Brendan Brammall, Jamie Cameron, Gerald Chan and Penelope Ng for their helpful comments and suggestions on earlier versions of this article. The author also thanks Cheryl McKinnon for her research assistance.

1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 7 [hereinafter "Charter"].

2 See, *e.g.*, Randal N.M. Graham, "Right Theory, Wrong Reasons: Dynamic Interpretation, the Charter and 'Fundamental Laws'" (2006) 34 S.C.L.R. (2d) 169 (examining the interpretive theory used by courts in s. 7 cases); David Mullan, "Section 7 and Administrative Law Deference — No Room at the Inn?" (2006) 34 S.C.L.R. (2d) 227 (critiquing the Supreme Court's denial of the relevance of administrative law principles to constitutional adjudication); Jamie Cameron, "Fault and Punishment under Sections 7 and 12 of the Charter" (2008) 40 S.C.L.R. (2d) 553 [hereinafter "Cameron"] (noting that the s. 7 jurisprudence "has become such an unwholesome jumble of tests and doctrines"); Alana Klein, "Section 7 of the Charter and the Principled Assignment of Legislative Jurisdiction" (2012) 57 S.C.L.R. (2d) 59 [hereinafter "Klein"] (urging an approach to s. 7 that accounts for the respective institutional roles of courts and legislatures).

3 *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43, [2000] 2 S.C.R. 307, at para. 188 (S.C.C.) [hereinafter "*Blencoe*"].

While the scope of the rights to "life, liberty and security of the person" is far from settled,[4] the principles of fundamental justice have proven to be the more elusive concept.[5] In the *B.C. Motor Vehicle Reference*,[6] Lamer J. began the Court's ambitious project of giving life to the "principles of fundamental justice" in a manner that was consistent with the Charter's transformative purpose. He eschewed the legislative history and originalist doctrine, which supported a definition of fundamental justice that was limited to procedural due process. He stressed that Canada had made a democratic decision to give the courts more power, including the power of constitutional judicial review.[7] For the newly planted Charter to fulfil its transformative purpose, section 7 must encompass both procedural and substantive principles of fundamental justice.[8]

Justice Lamer went on to provide some guidance on section 7's qualifier — the "principles of fundamental justice". The principles of fundamental justice were to be section 7's workhorse. Without that qualifier, section 7 would guarantee an absolute right to be free from government interference with life, liberty or security of the person. Justice Lamer held that the principles of fundamental justice were "to be found in the basic tenets of our legal system".[9] He did not, however, go on to define the principles of fundamental justice. Nor did he tie the principles of fundamental justice to any particular theory or judicial philosophy.

Justice Lamer's ambitious vision for the principles of fundamental justice provided an important building block for some of the most important and controversial decisions since the Charter's adoption, including the invalidation of Canada's abortion scheme;[10] the elimination of felony

---

[4] See, *e.g.*, Alan Young, "Deprivations of Liberty: The Impact of the Charter on Substantive Criminal Law" (2012) 57 S.C.L.R. (2d) 73 (addressing whether the "right to liberty" in s. 7 protects fundamental personal choices from state interference).

[5] See, *e.g.*, Mark Carter, "Fundamental Justice in Section 7 of the *Charter*: A Human Rights Interpretation" (2003) 52 U.N.B.L.J. 243 (urging courts to adopt an understanding of "fundamental justice" consistent with human rights theory); Peter W. Hogg, "The Brilliant Career of Section 7 of the Charter" (2012) 58 S.C.L.R. (2d) 195 (overview of the history of s. 7) [hereinafter "Hogg"].

[6] *Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 501-504 (S.C.C.) [hereinafter "*MVR*"].

[7] *Id.*, at 498-500.

[8] *Id.*, at 499 (noting that the Court's task "is not to choose between substantive or procedural content per se but to secure for persons 'the full benefit of the *Charter*'s protection' under s. 7, while avoiding adjudication of the merits of public policy") (citations omitted).

[9] *Id.*, at 503.

[10] *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.) [hereinafter "*Morgentaler*"].

murder provisions of the *Criminal Code*;[11] and the nullification of the federal government's decision to cancel a safe drug injection site.[12]

But in opening the section 7 principles of fundamental justice to substantive judicial review, Lamer J. appeared to give little thought to how Pandora's Box might be closed. If the principles of fundamental justice were to include substantive principles, what would be section 7's limits? How would these unwritten principles of fundamental justice be identified? What purposes and principles should guide courts when they are asked to recognize new principles of fundamental justice? Would Canadian section 7 jurisprudence forever be mired in a U.S.-style debate about the legitimacy of "substantive due process"?[13]

In subsequent cases, the Supreme Court of Canada has grappled with these questions, and at various points, has adopted "frameworks" and "tests" to limit the principles of fundamental justice. But it has never identified a theory to explain the principles of fundamental justice. Nevertheless, there is a sufficient body of jurisprudence to enable us to identify three complementary (but conceptually distinct) theories, which emerge implicitly from Supreme Court of Canada case law.

The first theory is *historical*: a principle of fundamental justice is a legal principle that was historically protected or is deeply rooted in our legal system's history and traditions. The courts will recognize a principle of fundamental justice if it can be anchored in a common law legal principle or in norms enshrined in the post-Second World War international human rights instruments that inspired the Charter's framers. Under this theory, the principal purpose of the section 7 principles of fundamental justice is to ensure that rights and principles do not lose their protected status merely because they were not specifically enumerated in the text of the Charter.

The second theory is *derivative*: it posits that the principles of fundamental justice are to be found in the *penumbra* of section 7 and the other "Legal Rights" protected under sections 8 to 14 of the Charter. This theory recognizes that for the Charter to fulfil its transformative purpose,

---

[11] R.S.C. 1985, c. C-46. See *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.); *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

[12] *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, [2011] 3 S.C.R. 134 (S.C.C.) [hereinafter "*PHS*"].

[13] See Ryan C. Williams, "The One and Only Substantive Due Process Clause" (2010) 120 Yale L.J. 408; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980), at 18 ("[W]e apparently need periodic reminding that 'substantive due process' is a contradiction in terms — sort of like 'green, pastel redness.'").

rights must not be frozen in 1982. Section 7 and sections 8 to 14 form an interconnected web of rights, which are mutually reinforcing. A legal principle is a principle of fundamental justice if it is necessary to give meaning and effect to the other principles of fundamental justice in sections 7 to 14 of the Charter. Under this theory, the principles of fundamental justice serve to fill in the gaps left by the enumerated principles of fundamental justice contained in sections 8 to 14 of the Charter and the historically entrenched section 7 principles of fundamental justice that have been "grandfathered" into section 7 by virtue of their pre-Charter status.

The third theory is *evolutionary*: even where a principle was neither historically protected nor found within the penumbras of sections 7 to 14 of the Charter, the Court may recognize a principle of fundamental justice where the right to life, liberty or security of the person outweighs a competing governmental interest. Respect for human dignity and autonomy are the animating principles. Under this theory, the principles of fundamental justice protect an evolving set of national values that command widespread contemporary support. Like the penumbra theory, this category also recognizes that rights must not be frozen in 1982, but it is broader and potentially more indeterminate. The courts have dealt with this potential indeterminacy by creating "frameworks" and "tests" meant to limit the ambit of the section 7 principles of fundamental justice. Owing in part to these cumbersome tests, this third category over time has coalesced around three principles of fundamental justice grounded in the concept of proportionality — *arbitrariness, overbreadth* and *gross disproportionality.*

These three theories of the principles of fundamental justice embody variants of the Charter's transformative purpose. Although none of the three theories described in this paper can alone account for all of the principles of fundamental justice that have been recognized since *MVR*, together they account for most (if not all) of the disparate approaches to the principles of fundamental justice in Supreme Court of Canada case law. The seeds of all three theories can be found in *MVR*, but each has developed separately.

The Supreme Court has never explicitly endorsed any of these theories. They emerge only implicitly from the case law. The goal of this paper is to render them explicit. This exercise is not merely academic. By attempting to illuminate the reasoning behind these decisions, I hope to identify lessons for future litigants seeking to assert their section 7 Charter rights.

II. THE THREE THEORIES OF FUNDAMENTAL JUSTICE

1. The Historical Principles of Fundamental Justice

In *MVR*, Lamer J. noted that the principles of fundamental justice "are to be found in the basic tenets of our legal system".[14] The "basic tenets" are not defined, but Lamer J. wrote that many of these principles of fundamental justice "have been developed over time as presumptions at common law, [while] others have found expression in the international conventions on human rights".[15] This language suggests that courts ought to recognize a principle of fundamental justice if that principle was previously acknowledged as fundamental to our legal system in the pre-Charter era. This theory of the principles of fundamental justice looks to the past.

The historical approach posits that the principles of fundamental justice fulfil an overarching purpose of the Charter by ensuring that rights and principles do not lose their protected status merely because they were not specifically enumerated in the text of the Charter. At its broadest level, the purpose of the Charter was to transform Canada into a constitutional democracy in which Government was constrained not only by institutional structures, but also by the human and civil rights belonging to the people.[16] Prior to the Charter's adoption, individual rights and liberties in Canada had been protected primarily under the common law. But the common law is subservient to the will of the legislature, which can narrow or altogether eliminate common law rights. Even a statutory bill of rights lacks the *gravitas* and force of law to supplant the will of the legislature, as our experience with the *Canadian Bill of Rights* showed. [17] By contrast, a constitutional bill of rights "withdraw[s] certain

---

[14] *MVR*, *supra*, note 6, at 503.

[15] *Id.*

[16] See Lorraine E. Weinrib, "The Canadian *Charter*'s Transformative Aspirations" (2003) 19 S.C.L.R. (3d) 17, at 17-19; Lorraine E. Weinrib, "The Postwar Paradigm and American Exceptionalism" in Sujit Choudhry, ed., *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006), at 84; John D. Whyte, "The *Charter* at 30: A Reflection" (2012) 17 Rev. Const. Stud. 1, at 2.

[17] *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III. For examples of the ineffectiveness of the *Bill of Rights*, see, *e.g.*, *Bliss v. Canada (Attorney General)*, [1978] S.C.J. No. 81, [1979] 1 S.C.R. 183 (S.C.C.) (holding that the equality clause of the *Bill of Rights* was not violated by the denial of benefits to women under the *Unemployment Insurance Act* during pregnancy); *Canada (Attorney General) v. Lavell*, [1973] S.C.J. No. 128, [1974] S.C.R. 1349 (S.C.C.) (holding that provisions of the *Indian Act* that deprived Aboriginal women (but not

subjects from the vicissitudes of political controversy" and "place[s] them beyond the reach of majorities".[18] Rights protected under the common law or statute are ephemeral; rights protected by a constitutionally entrenched bill of rights are guaranteed.

The section 7 principles of fundamental justice are essential to the Charter's transformative purpose. A constitutional bill of rights like the Charter involves the enumeration of specific rights. But a danger arises if those specifically mentioned rights are taken as *exhaustive* instead of *illustrative.* By enumerating rights in a constitutional bill of rights, we risk obscuring or altogether eliminating those rights that existed at common law and thus stunting the "living tree" Constitution that the Supreme Court has so diligently nurtured. The recognition of unenumerated principles of fundamental justice forecloses the application of *expressio unius est exclusio alterius*.[19] The principles of fundamental justice incorporate into section 7 of the Charter those unwritten principles that are fundamental to a free and democratic society. They thus serve to ensure that the specific enumeration of fundamental rights and freedoms does not leave Canadians less free than they were prior to the Charter's enactment. Under the historical approach, section 7 must incorporate those principles that were fundamental to our legal system at the time of the Charter's adoption, but not necessarily any others.

(a) From MVR *to* Oickle *and* Latimer

Claims rooted in the historical principles of fundamental justice are relatively straightforward for rights claimants. To establish a principle of fundamental justice under this theory, one need only identify a historical precedent. If there is an unbroken chain of rights protection reaching back to our Nation's pre-Charter history, that principle will be recognized as a principle of fundamental justice. *MVR* was an easy case precisely because the principle at issue — the requirement of *mens rea* as a prerequisite for criminal liability — is firmly embedded in our Nation's

---

Aboriginal men) of their status for marrying a non-Indian did not violate their right to "equality before the law" under the *Canadian Bill of Rights*).

[18] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, at 638 (1943), *per* Jackson J.

[19] "The express mention of one thing excludes all others." See *Turgeon v. Dominion Bank*, [1929] S.C.J. No. 56, [1930] S.C.R. 67, at 70-71 (S.C.C.); Ruth Sullivan, *Construction of Statutes*, 5th ed. (Markham, ON: LexisNexis Canada, 2008), at 251-52.

legal history, traditions and jurisprudence.[20] In *MVR*, British Columbia had created an absolute liability offence for driving with a suspended licence. The Crown needed only to establish proof of driving regardless of whether the driver was aware of the suspension or not. This law offended the principles of fundamental justice. Absolute liability — *i.e.*, the complete absence of a guilty mind — offends the principle that the morally innocent should not be punished. This principle, as Lamer J. noted, "has from time immemorial been part of our system of laws".[21] With history as its arbiter, there was no need for the Court to go further in its inquiry.

The "confessions rule" is another principle of fundamental justice that the Supreme Court identified using the historical approach.[22] In *Oickle*,[23] the Court traced the lineage of the confessions rule to a number of pre-Charter common law decisions, relying, *inter alia*, on the Privy Council's 1914 holding in *Ibrahim v. R.* that "no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority".[24] As the Court noted in *Oickle*, the Supreme Court of Canada had adopted and repeatedly re-affirmed the rule from *Ibrahim* in its pre-Charter jurisprudence.[25] The Court did not need to go further. The confessions rule's status as a pre-Charter fundamental principle had "grandfathered" it into the section 7 principles of fundamental justice.

---

[20] *MVR*, *supra*, note 6, at 514 ("Absolute liability in penal law offends the principles of fundamental justice.").

[21] *Id.*, at 513.

[22] Although the Court in *Oickle* held that the confessions rule is still a "common law" rule rather than a Charter right, commentators note that the Court has treated it as a principle of fundamental justice protected by s. 7. See *R. v. G. (B.)*, [1999] S.C.J. No. 29, [1999] 2 S.C.R. 475, at para. 44 (S.C.C.) (holding that "Parliament could not make [an involuntary statement] admissible for any purpose whatsoever without violating s. 7 of the Charter"); see also Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012), at 213 [hereinafter "Stewart"]. See *contra* Hon. Gary T. Trotter, "The Limits of Police Interrogation: The Limits of the Charter" (2008) 40 S.C.L.R. (2d) 293 (arguing that the common law confessions rule continues to have relevance and that attempts to "Charter-ize" it may erode its protections).

[23] *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 24 (S.C.C.) [hereinafter "*Oickle*"].

[24] [1914] A.C. 599, at 609 (J.C.P.C.).

[25] *R. v. Prosko*, [1922] S.C.J. No. 6, 63 S.C.R. 226 (S.C.C.); *R. v. Boudreau*, [1949] S.C.J. No. 10, [1949] S.C.R. 262 (S.C.C.); *R. v. Fitton*, [1956] S.C.J. No. 70, [1956] S.C.R. 958 (S.C.C.); *R. v. Wray*, [1970] S.C.J. No. 80, [1971] S.C.R. 272 (S.C.C.); *R. v. Rothman*, [1981] S.C.J. No. 55, [1981] 1 S.C.R. 640 (S.C.C.).

Solicitor-client privilege is yet another principle of fundamental justice that the Supreme Court derived from the historically based approach to the principles of fundamental justice.[26] The Court held that it is beyond dispute that solicitor-client privilege existed and was jealously protected well before the enactment of the Charter. This principle is among the "oldest of the privileges", having "roots in the 16th century".[27]

The right to make full answer and defence is another example of a principle of fundamental justice identified using the historical approach. Although not specifically enumerated by the Charter, this right was deemed protected by the principles of fundamental justice because of that right's pre-Charter common law status as "one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted".[28]

Where a principle of fundamental justice has been anchored in historical precedent, the Supreme Court has felt itself on surer footing when granting a forceful remedy. In *R. v. Latimer*, a case in which the accused was charged with murder for euthanizing his disabled daughter, the Crown had interfered with jury selection by distributing questionnaires to prospective jurors, asking them for their opinions about various social issues, including euthanasia. Quoting from an oft-cited English case, Lamer J. held that "[t]he interference contravened a fundamental tenet of the criminal justice system, which Lord Hewart C.J. put felicitously as 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'".[29] The state's interference with prospective jurors offended this principle of fundamental justice. It was

---

[26] *R. v. McClure*, [2001] S.C.J. No. 13, [2001] 1 S.C.R. 445, at paras. 25-28 (S.C.C.) [hereinafter "*McClure*"]. See also *Canada v. Solosky*, [1979] S.C.J. No. 130, [1980] 1 S.C.R. 821, at 833-36 (S.C.C.) [hereinafter "*Solosky*"]; *Descôteaux v. Mierzwinski*, [1982] S.C.J. No. 43, [1982] 1 S.C.R. 860, at 875 (S.C.C.); *Smith v. Jones*, [1999] S.C.J. No. 15, [1999] 1 S.C.R. 455, at paras. 44-50 (S.C.C.); *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] S.C.J. No. 61, [2002] 3 S.C.R. 209, at paras. 18-19 (S.C.C.); *Pritchard v. Ontario (Human Rights Commission)*, [2004] S.C.J. No. 16, [2004] 1 S.C.R. 809, at paras. 16-17 (S.C.C.); *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] S.C.J. No. 31, [2006] 2 S.C.R. 32, at paras. 15-17, 22-25 (S.C.C.); *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] S.C.J. No. 45, [2008] 2 S.C.R. 574, at paras. 11, 16-17 (S.C.C.).

[27] *McClure*, *id.*, at para. 20.

[28] *R. v. Stinchcombe*, [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326, at 336 (S.C.C.) [hereinafter "*Stinchcombe*"] (citing *Dersch v. Canada (Attorney General)*, [1990] S.C.J. No. 113, [1990] 2 S.C.R. 1505, at 1514 (S.C.C.)); *R. v. Rose*, [1998] S.C.J. No. 81, [1998] 3 S.C.R. 262, at para. 98 (S.C.C.); *McClure*, *id.*, at paras. 38-39.

[29] *R. v. Latimer*, [1997] S.C.J. No. 11, [1997] 1 S.C.R. 217, at para. 43 (S.C.C.) (quoting *R. v. Sussex Justices*, [1923] All E.R. Rep. 233, [1924] 1 K.B. 256, at 259 (K.B.D.)).

immaterial whether the state interference resulted in selecting jurors who were actually biased or whether the ultimate fairness of the trial was affected. The violation of the fundamental principle that "justice must be seen to be done" demanded a new trial.

The combination of a violation of a historical principle of fundamental justice, coupled with a strong remedy, stands in contrast to other cases, where the Court, despite recognizing a "new" principle of fundamental justice, will grant a lesser remedy. The Court in *Oickle* held that a violation of the historical confessions rule "always warrants exclusion" of evidence, whereas a violation of the related Charter right to silence will justify exclusion of evidence only where its admission would "bring the administration of justice into disrepute".[30]

(b) The Limits of the Historical Approach

The historical approach to the principles of fundamental justice answers Lamer J.'s critics who argue that his vision of section 7 is vague, indeterminate and unprincipled.[31] If the principles of fundamental justice are rooted in historical precedent, then they are necessarily finite and identifiable.

Yet, the historical approach is unsatisfactory as a generalized theory. First, "[a]ll history becomes subjective".[32] It is also murky. While some rights and principles can be neatly traced back to the *Magna Carta*, those cases will be relatively rare. Solicitor-client privilege, for example, has a venerable history, but for much of that history, it was a rule of evidence rather than a substantive legal principle. Its elevation to fundamental principle occurred much later.[33]

Further, to rely solely on the historical approach to the principles of fundamental justice is to freeze section 7's development in 1982: only rights that already had been recognized as fundamental in the pre-Charter era could receive section 7's constitutional protection. This would be at odds with the large, liberal and purposive approach to constitutional

---

[30] *Oickle*, *supra*, note 23, at para. 30.

[31] See, *e.g.*, Jamie Cameron, "From the *MVR* to *Chaoulli v. Quebec*: The Road Not Taken and the Future of Section 7" (2006) 34 S.C.L.R. (2d) 105 [hereinafter "Cameron, 'From the *MVR* to *Chaoulli*'"] (for criticism of indeterminacy of "*MVR* logic"); Cameron, *supra*, note 2, at 556.

[32] Ralph Waldo Emerson, "History" in *Essays* (Boston: Houghton Mifflin Co., 1883), at 10.

[33] *Solosky*, *supra*, note 26, at 834-35. See also Mahmud Jamal & Brian Morgan, "The Constitutionalization of Solicitor-Client Privilege" (2003) 20 S.C.L.R. (3d) 213, at 214-29.

interpretation that the Court has continually espoused.[34] In *MVR*, Lamer J., despite stating that the principles of fundamental justice would be found in our legal traditions, also cautioned that the interpretation of section 7 must account for the "newly planted 'living tree' which is the *Charter*", which should allow for the "possibility of growth and adjustment over time", and should not be stultified by "historical materials".[35]

In addition, the historical approach does not explain many of the principles of fundamental justice that have been recognized since *MVR*. Many of the principles of fundamental justice that are discussed in the next two sections are not anchored in historical precedent.

Indeed, some of the most firmly entrenched principles of fundamental justice are not just unexplained by, but plainly inconsistent with, a historical approach. For example, it is now well established that laws that limit the right to life, liberty or security of the person and are "arbitrary", "overbroad" or "grossly disproportionate" will offend the principles of fundamental justice.[36] The very idea that laws could be judicially reviewed on such grounds was anathema to Canada's pre-Charter Westminster system of government, where Parliament reigned supreme. Prior to the Charter's enactment, provided that government respected its jurisdictional limits, there was nothing that prevented Parliament from passing laws that were arbitrary, overbroad or grossly disproportionate in relation to the liberty interests of the Canadian people. Whatever the doctrinal rationale of substantive review of legislation on grounds of disproportionality, it is not rooted in history. Thus, while the historical approach is a useful theory to explain some principles of fundamental justice, it does not and cannot account for all of them.

2. The Penumbra Theory of Principles of Fundamental Justice

The penumbra theory of the principles of fundamental justice justifies the recognition of section 7 principles of fundamental justice that are not firmly anchored in historical precedent. Under this approach, the principles of fundamental justice protected by section 7 and the legal rights enshrined in sections 8 to 14 of the Charter form an interconnected

---

34 *Hunter v. Southam Inc*., [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 155-56 (S.C.C.).
35 *MVR*, *supra*, note 6, at 509.
36 See *infra*, Part II.3(c).

normative framework, which inform each other.[37] The rights enumerated under sections 8 to 14 of the Charter are illustrations of principles of fundamental justice. The unwritten penumbra principles serve to fill in the gaps left by the enumerated principles of fundamental justice contained in sections 8 to 14 of the Charter and the historically entrenched section 7 principles of fundamental justice. In this way, the historical approach and the penumbra theory are complementary. Under the penumbra theory, principles that cannot be traced to history or the constitutional text may nonetheless be worthy of protection as fundamental if they are necessary to give established rights and principles meaning and effect.

The term "penumbra" is borrowed from U.S. constitutional law.[38] In *Griswold v. Connecticut*,[39] the U.S. Supreme Court recognized a constitutionally protected right to privacy.[40] The right to privacy was not specifically enumerated in the U.S. *Bill of Rights*, but Douglas J., writing for the majority, held that the "specific guarantees in the *Bill of Rights* have penumbras, formed by emanations from those guarantees that help give them life and substance".[41] In essence, the enumerated rights have penumbras that help protect the core. The *Griswold* decision formed the intellectual bedrock for the U.S. Supreme Court's subsequent decision in *Roe v. Wade*, where the Court ruled that the constitutional right to privacy protected a woman's right to have an abortion.[42]

In *MVR*, Lamer J. embraced the idea of a penumbra around section 7 and sections 8 to 14 of the Charter (although he did not use that terminology). He describes the formation of a penumbra emanating from section 7 and sections 8 to 14 that fills in gaps left by the enumerated rights. Justice Lamer noted that "ss. 8 to 14 provide an invaluable key to

---

[37] See *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] S.C.J. No. 23, [1990] 1 S.C.R. 425, at 536 (S.C.C.), *per* La Forest J. ("[T]he rights and freedoms protected by the *Charter* are not insular and discrete, but are aimed rather at protecting a complex of interacting values, each more or less fundamental to the free and democratic society that is Canada.") (citations omitted).

[38] I am mindful of Cardozo J.'s pointed warning that "[m]etaphors in law are to be narrowly watched, for starting out as devices to liberate thought, they end often by enslaving it". *Berkey v. Third Ave. Ry*, 244 N.Y. 84, at 94 (1926), *per* Cardozo J.

[39] 381 U.S. 479 (1965).

[40] While *Griswold* is credited with popularizing the use of the penumbra metaphor, the metaphor can be traced to an 1873 statement by Holmes J. See O.W. Holmes, "The Theory of Torts" (1873) 7 Am. L. Rev. 652, at 654, reprinted in (1931) 44 Harv. L. Rev. 773, at 775. See also Burr Henly, "'Penumbra': The Roots of a Legal Metaphor" (1987-1988) 15 Hastings Const. L.Q. 81, at 83-84.

[41] *Id.*

[42] 410 U.S. 113 (1973).

the meaning of 'principles of fundamental justice'".[43] He further explained that:

> Sections 8 to 14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice. For they, in effect, illustrate some of the parameters of the "right" to life, liberty and security of the person; they are examples of instances in which the "right" to life, liberty and security of the person would be violated in a manner which is not in accordance with the principles of fundamental justice. To put matters in a different way, ss. 7 to 14 could have been fused into one section, with inserted between the words of s. 7 and the rest of those sections the oft utilized provision in our statutes, "and, without limiting the generality of the foregoing (s. 7) the following shall be deemed to be in violation of a person's rights under this section".[44]

Section 7 and sections 8 to 14 are conceptually "fused". Each of the enumerated rights informs the scope of the other. From these emanations, new principles of fundamental justice emerge. But the emanations from these penumbras are not unfettered. A principle will be recognized as a principle of fundamental justice only if that new principle is necessary to give existing rights and principles a full, meaningful and purposive interpretation. The penumbra principles are thus "gap fillers". They serve to ensure that the state cannot undermine constitutional protections by doing indirectly what is directly forbidden.

(a) The Growing Penumbra

The Supreme Court's decision in *R. v. Hebert* exemplifies the penumbra theory.[45] In *Hebert*, the Court affirmed a robust pre-trial right to silence under section 7. Hebert had been arrested and was in custody. He had asserted his right to counsel and told the police that he did not wish to make a statement. He was then put in a cell next to an undercover officer posing as a suspect, who engaged the accused in conversation. The accused made various incriminating statements, which he sought to exclude on section 7 Charter grounds. However, the historical principles of fundamental justice alone would not have afforded Hebert any relief. The historical common law confessions rule set out in *Ibrahim v. R.* protects the

---

43 *MVR*, *supra*, note 6, at 503.

44 *Id.*, at 502-503.

45 [1990] S.C.J. No. 64, [1990] 2 S.C.R. 151 (S.C.C.) [hereinafter "*Hebert*"].

accused from overt threats or inducements. The common law also afforded the accused the right to remain silent.[46] These historical common law rights, however, did not on their own, protect the accused from the deceptive police conduct at issue in *Hebert*.

But Hebert was protected by the section 7 penumbra. Justice McLachlin (as she then was), writing for the majority, held that the common law confessions rule and common law right to silence did not exhaust the Charter's protection because "[i]t would be wrong to assume that the fundamental rights guaranteed by the *Charter* are cast forever in the straight-jacket of the law as it stood in 1982".[47] A principle of fundamental justice "may be broader and more general than the particular [pre-existing] rules which exemplify it".[48]

Justice McLachlin thus looked to the penumbra: "[T]he right of a detained person to silence should be philosophically compatible with related rights, such as the right against self-incrimination at trial and the right to counsel."[49] The right against self-incrimination and the common law confessions rule must be construed purposefully. Both were rooted in an abhorrence of the old ecclesiastical courts and the Star Chamber, which gave rise to the fundamental tenet that a citizen involved in the criminal process must be afforded procedural protections against the overweening power of the state.[50] The right to counsel serves a complementary role, ensuring that the accused understands his right not to be compelled to produce evidence against himself.[51] These rights and principles are meant to give the accused a *bona fide* choice as to whether to speak to the police.

For these rights and principles to be meaningful, the accused must be afforded a robust right to silence. That right must be broad enough to preclude attempts by the state to unreasonably leverage its superior power to overwhelm the accused's ability to choose whether to speak to the police. Thus, the section 7 right to silence precludes the use of "tricks which would effectively deprive the suspect of this choice [to remain silent]".[52] Anything less would permit the police to do indirectly what the

---

46 *R. v. Rothman*, [1981] S.C.J. No. 55, [1981] 1 S.C.R. 640, at 682 (S.C.C.), *per* Lamer J.
47 *Hebert*, *supra*, note 45, at 163.
48 *Id.*
49 *Id.*
50 *Id.*, at 173-74.
51 *Id.*, at 176-77.
52 *Id.*, at 180.

Charter does not permit them to do directly and render the right to counsel and right against self-incrimination illusory.[53]

The penumbra of the pre-trial right to silence extends to a right to silence at trial and also limits the evidentiary use of the accused's exercise of his right to silence. As the Court noted in *R. v. Chambers*, the pre-trial right to silence "would be an illusory right if the decision not to speak to the police could be used by the Crown as evidence of guilt".[54] Hence, a majority of the Court in *R. v. Noble* held that the Crown could not invite the jury to infer guilt from the accused's exercise of the right to silence.[55] Justice Fish recently re-affirmed this right in *R. v. Prokofiew*.[56] This line of cases represents an aggressive yet principled expansion of the section 7 penumbra to ensure that the right to silence retains its meaningfulness at all stages of the criminal prosecution. These rights are not specifically enumerated in any constitutional text, but their protection was necessary to protect "core" Charter rights.

Other important examples in the penumbra line of cases include *R. v. Pearson*[57] and *R. v. Gardiner*,[58] which dealt with the penumbra of the presumption of innocence at bail and at sentencing, respectively.[59] The presumption of innocence is expressly enumerated in section 11(d) of the Charter, which provides that "[a]ny person charged with an offence has the right ... to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". A strict reading of section 11(d) would limit the applicability of the presumption of innocence to trial. However, as Dickson C.J.C. held in *R. v. Oakes*, a more general protection of the presumption of innocence can be found within the penumbra of section 7 and section 11(d) of the Charter: "although protected expressly in s. 11(d) of the *Charter*, the presumption of innocence is referable and

---

[53] *Id.*, at 180-81.

[54] *R. v. Chambers*, [1990] S.C.J. No. 108, [1990] 2 S.C.R. 1293, at 1316 (S.C.C.) (quoting *R. v. Turcotte*, [2005] S.C.J. No. 51, [2005] 2 S.C.R. 519, at 533 (S.C.C.)).

[55] *R. v. Noble*, [1997] S.C.J. No. 40, [1997] 1 S.C.R. 874 (S.C.C.).

[56] [2012] S.C.J. No. 49, [2012] 2 S.C.R. 639, at paras. 64-66 (S.C.C.), *per* Fish J., dissenting on other grounds. The *Prokofiew* majority did not reconsider *R. v. Noble* despite having been asked by the Crown to overturn it.

[57] [1992] S.C.J. No. 99, [1992] 3 S.C.R. 665 (S.C.C.) [hereinafter "*Pearson*"].

[58] [1982] S.C.J. No. 71, [1982] 2 S.C.R. 368 (S.C.C.).

[59] Although *Gardiner* was a pre-Charter case, the rule from *Gardiner* arguably was constitutionalized in *R. v. Pearson*.

integral to the general protection of life, liberty and security of the person contained in s. 7 of the *Charter*".[60]

The corollary of the general right to be presumed innocent throughout the criminal justice process is a corresponding requirement that the Crown retain the burden of proof beyond a reasonable doubt throughout the prosecution.[61] Consequently, in *R. v. Gardiner*, the Supreme Court held that because the sentencing process was the "ultimate jeopardy" to the individual, the Crown should not be permitted to do through the sentencing process what it was expressly forbidden from doing during the trial. Thus, where the Crown seeks to advance aggravating facts at a sentencing hearing, the Crown must establish those facts beyond a reasonable doubt. This right of the accused to hold the Crown to a proof beyond a reasonable doubt standard at sentencing resides in the penumbra of sections 7 and 11(d) of the Charter.

Similarly, in *R. v. Pearson*, the Court held that the presumption of innocence informed the meaning of the section 11(e) right to a reasonable bail. Again, while the section 11(d) presumption of innocence did not on its face appear to apply to bail hearings, the general section 7 right to be presumed innocent informed the proper interpretation of section 11(e) of the Charter.[62] It is thus a principle of fundamental justice that an accused shall be presumed innocent at her bail hearing.

The right to Crown disclosure can also be found in the penumbra of section 7. In *R. v. Stinchcombe*, a unanimous Court noted that at common law there was a duty on the Crown to "bring forward evidence of every material fact known to the prosecution whether favourable to the accused or otherwise".[63] That right, along with the common law right to make full answer and defence, which had "acquired new vigour by virtue of its inclusion in s. 7" of the Charter, underscored the need for a more robust right to disclosure.[64] The Crown's obligation to disclose under the Charter is thus broader than the duty that existed at common law, and extends to all material in its possession relating to the investigation against the accused unless it is clearly irrelevant or privileged.[65] In *R. v.*

---

[60] *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at 119 (S.C.C.) [hereinafter "*Oakes*"].

[61] *Id.*, at 120.

[62] *Pearson*, *supra*, note 57, at 688-89.

[63] *Stinchcombe*, *supra*, note 28, at 338 (quoting *R. v. Lemay*, [1951] S.C.J. No. 42, [1952] 1 S.C.R. 232, at 257 (S.C.C.)).

[64] *Id.*, at 336.

[65] *Id.*, at 335-36.

McNeil, the Court further expanded the penumbra of full answer and defence and held that under the *Stinchcombe* disclosure regime, the Crown had a good-faith duty to inquire as to whether any other law enforcement agency, such as the police, possessed information that was potentially relevant to the Crown's case or the accused's defence.[66]

The right to cross-examination is also located in the penumbra of section 11(d) and the section 7 right to make full answer and defence.[67] In *R. v. Lyttle*, the Supreme Court held that the penumbra of this right extended to "the right of an accused to cross-examine witnesses for the prosecution without significant and unwarranted constraint".[68]

The penumbra theory also explains the principles of fundamental justice that govern jury selection. The common law protected the right to an impartial jury. This right had been constitutionalized under section 11(f) of the Charter, which guaranteed the right to a jury trial where the maximum punishment for an offence exceeds five years' imprisonment. In *R. v. Sherratt*, the Court held that the section 11(f) right to a jury must be understood with reference to the section 11(d) right to a fair trial.[69] Jury selection should be driven by the "fundamental rights to a fair trial by an impartial jury and to equality before and under the law".[70] As a corollary, juries must be representative of the community.[71]

The penumbra of this right to a fair, impartial and representative jury, required modification of the common law and statutory rules regarding jury selection. At common law and in the *Criminal Code*,[72] the Crown and the accused were not on equal footing when it came to the number of prospective jurors they could dismiss without cause during jury selection. Under the *Criminal Code*'s rules, the Crown could ask up to 48 prospective jurors to "stand by" in the jury selection process. The stand-by was a tool of long-standing historical precedent, dating back to the 1300s.[73] These stand-bys provided by the *Criminal Code* were in addition to the four peremptory challenges permitted to the Crown, giving the Crown a 4.25-1 numerical advantage in excusing prospective jurors. In *R. v.*

---

66 *R. v. McNeil*, [2009] S.C.J. No. 3, [2009] 1 S.C.R. 66, at paras. 48-51 (S.C.C.).

67 *R. v. Osolin*, [1993] S.C.J. No. 135, [1993] 4 S.C.R. 595, at 665 (S.C.C.).

68 *R. v. Lyttle*, [2004] S.C.J. No. 8, [2004] 1 S.C.R. 193, at para. 1 (S.C.C.).

69 *R. v. Sherratt*, [1991] S.C.J. No. 21, [1991] 1 S.C.R. 509 (S.C.C.).

70 *R. v. Williams*, [1998] S.C.J. No. 49, [1998] 1 S.C.R. 1128, at para. 49 (S.C.C.).

71 *Id.*, at paras. 42-47.

72 R.S.C. 1985, c. C-46.

73 Sanjeev Anand, "The Origins, Early History and Evolution of the English Criminal Trial Jury" (2005) 43 Alta. L. Rev. 407, at paras. 38-40.

Bain,[74] the accused challenged the stand-by provisions of the *Criminal Code*. Although the Crown's numerical advantage was prescribed by law and had long been a part of the common law, the majority of the Court held that "the overwhelming numerical superiority of choice granted to the Crown creates a pervasive air of unfairness in the jury selection procedure".[75] There was no specific right in the Charter that required parity between the Crown and the accused when it came to jury selection. But this inequality was incompatible with the right to an impartial and representative jury protected by the penumbra of sections 7, 11(d) and 11(f) of the Charter.

There are arguably examples where it is difficult to discern whether a section 7 principle of fundamental justice is properly categorized as belonging to the penumbra or whether it is a historical principle. The right to *Stinchcombe* disclosure is one such example. On one hand, the fact that prosecutors had "generally cooperated in making disclosure available" gave rise to an argument that the common law required Crown disclosure. Justice Sopinka, however, held that "the law with respect to the duty of the Crown to disclose is not settled".[76] To the extent that any right to Crown disclosure existed at common law, there was likely insufficient evidence in the historical record to show that it was protected as a fundamental right. Accordingly, it is properly categorized within the penumbra of section 7 and the right to make full answer and defence. Still, it is worth noting that these categories are not watertight compartments, but rather useful ways of organizing the Supreme Court of Canada's methodologies in its section 7 decisions.

As "gap-fillers", the penumbra principles of fundamental justice share some similarities with "unwritten constitutional principles".[77] Granted, all section 7 principles of fundamental justice that are not enumerated in sections 8 to 14 are "unwritten" in addition to being "constitutional principles". Yet, the penumbra principles of fundamental justice in section 7 are conceptually distinct from the unwritten constitutional principles (as that term is normally understood). Although a detailed examination of the relationship between these concepts is beyond the scope of this article, it is important that they not be conflated. Both the

---

[74] [1992] S.C.J. No. 3, [1992] 1 S.C.R. 91, at 103 (S.C.C.).

[75] *Id.*, at 103, *per* Cory J.

[76] *Stinchcombe*, *supra*, note 28, at 331.

[77] See *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at paras. 49-54 (S.C.C.).

penumbra principles of fundamental justice and the unwritten constitutional principles function as "gap fillers", but the size of the gaps they fill differs. Whereas the penumbra principles fill the gaps in the interstitia between sections 7 and 14 of the Charter, the unwritten constitutional principles involve overarching "vital unstated assumptions" and "organizing principles" that animate the entire written text of the Constitution and our legal system.[78] The penumbra principles involve ensuring that existing legal rights protected under sections 7 to 14 are not undermined by gaps in the constitutional framework and thus are anchored in the text. Unwritten constitutional principles — like the "rule of law"[79] or "independence of the judiciary"[80] — are foundational and might not be moored to the text of the Constitution at all.[81]

(b) The Waning Penumbra

The penumbra mode of reasoning was a mainstay of the Court's early section 7 jurisprudence. It is lamentable, however, that the Court did not explicitly acknowledge it. Justices of the Supreme Court come and go, and unspoken but implicit rules and doctrines retire along with their proponents. It is thus perhaps unsurprising that although the penumbra approach led to an explosion of newly recognized section 7 rights during the 1990s, its use has receded in recent years, sometimes depriving litigants of their best arguments. The Supreme Court's decisions in *R. v. Singh* and *R. v. Sinclair* are useful examples.[82]

Mr. Singh was charged with first degree murder. After consulting with counsel, he advised the police that he did not wish to make a statement. The police persisted in attempting to question Mr. Singh despite his 18 declarations that he wished to remain silent. Eventually, Mr. Singh gave an incriminating statement. In a 5-4 decision, the majority of the Supreme Court held that there was no violation of the right to silence.

---

[78] *Id.*, at paras. 49, 53.

[79] *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (S.C.C.).

[80] *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3 (S.C.C.).

[81] See Sujit Choudhry, "Unwritten Constitutionalism in Canada: Where Do Things Stand?" (2001) 35 Can. Bus. L.J. 113; Alex Schwartz, "The Rules of Unwritten Law: A Cautious Critique of *Charkaoui v. Canada*" (2007-2008) 13 Rev. Const. Stud. 179.

[82] *R. v. Singh*, [2007] S.C.J. No. 48, [2007] 3 S.C.R. 405 (S.C.C.) [hereinafter "*Singh*"]; *R. v. Sinclair*, [2010] S.C.J. No. 35, [2010] 2 S.C.R. 310 (S.C.C.) [hereinafter "*Sinclair*"].

While Mr. Singh had a right to silence, the police were not precluded from trying to persuade him to waive that right, provided that their tactics did not cause Mr. Singh's will to be overborne.[83]

Justice Fish, writing for the four dissenting justices, held that the police "unfairly frustrated [Mr. Singh's] decision on the question of whether to make a statement to the authorities".[84] His reasoning evoked the section 7 penumbra: The police's denigration of counsel's advice and failure to respect Mr. Singh's right to silence "collaterally" infringed Mr. Singh's right to counsel.[85] For the right to silence and right to counsel to be meaningful, the police must be under a corollary duty to respect the invocation of that right. Justice Fish's decision is conceptually consistent with the penumbra approaches of the 1990s, but by 2006 when *Singh* was decided, that approach was a dissenting one.[86]

Sinclair followed a similar pattern. Mr. Sinclair was arrested and detained. He was advised of his right to counsel and right to silence. He exercised his right to counsel (speaking to counsel twice) and repeatedly maintained that he did not want to speak to the police. He also asked if his counsel could be present during the interrogation. The police succeeded in eventually convincing Mr. Sinclair to speak with them and he eventually incriminated himself in a murder plot. He argued that the police had infringed his Charter rights on the basis that rights protected under section 10(b) and section 7 of the Charter afforded him not just the right to counsel but the right to meaningful assistance, which includes the right to have counsel present during an in-custody interrogation. By a 6-3 majority, the Supreme Court rejected this argument.[87]

In many ways, *Sinclair* ought to have been a paradigmatic penumbra case. The purpose of the penumbra principles of fundamental justice is to ensure that core rights protected by established principles of fundamental justice are not undermined by gaps in our constitutional framework. A panoply of principles of fundamental justice protected Mr. Sinclair: the right to silence, the right against self-incrimination and the presumption of innocence all work together to ensure that suspects are never obligated

---

[83] *Singh*, *id.*, at paras. 38-53.

[84] *Id.*, at para. 63 (quoting *Hebert*, *supra*, note 45).

[85] *Id.*, at para. 62.

[86] See Lisa Dufraimont, "The Patchwork Principle against Self-Incrimination under the Charter" (2012) 57 S.C.L.R. (2d) 241, at 257 (noting the dissonance between the Supreme Court's majority opinions in *Hebert* and *Singh*).

[87] *Sinclair*, *supra*, note 82, at para. 38.

to participate in building the case against them.[88] The right to counsel ensures that the accused is made aware of his rights and how to effectively exercise them,[89] and above all, is "treated fairly in the criminal process".[90] Sinclair had properly invoked his constitutional rights. But by waiting until after the accused had spoken to counsel and by ignoring Sinclair's right to silence (which was permitted by the Court's holding in *Singh*), the police undermined those constitutional safeguards. As Binnie J. pointed out in dissent,[91] the police had succeeded in rendering Sinclair's counsel as effective as a telephone answering service providing two minutes of pre-recorded legal advice. The penumbra principles of fundamental justice exist to avoid such absurd outcomes. As the *Sinclair* dissent explained, a robust right to counsel, which protected the right to have counsel present during an interrogation, would have bridged the gap in the constitutional framework.[92]

Despite *Singh* and *Sinclair*, the penumbra theory remains a conceptually attractive, middle-of-the-road approach to the principles of fundamental justice. Although the penumbra theory is broader than the historical approach, it is not indeterminate. Penumbra principles of fundamental justice are derivative of pre-existing rights found in the common law and in the Charter's enumerated provisions. The penumbra theory thus strikes the appropriate balance between a conception of section 7 that is frozen in 1982 and an approach so broad that it is indeterminate.

Still, even at its highest, the penumbra theory may be unduly restrictive. Justice Lamer moored the penumbra of section 7 to the "Legal Rights" contained in sections 8 to 14 of the Charter, and in so doing, expressly excluded from the penumbra the fundamental freedoms (section 2), democratic rights (sections 3-4), mobility rights (section 6) and equality rights (section 15) guaranteed by the Charter.[93] Subsequent case law appears to have followed suit. In *C. (A.) v. Manitoba (Director of Child and Family Services)*,[94] the Court rejected the rights-holder's claim that her right to religious freedom under section 2(a) augmented her section 7 right to be

---

88 *Id.*, at 156-59, *per* LeBel and Fish JJ., dissenting.

89 *R. v. Manninen*, [1987] S.C.J. No. 41, [1987] 1 S.C.R. 1233, at 1242-43 (S.C.C.).

90 *R. v. Bartle*, [1994] S.C.J. No. 74, [1994] 3 S.C.R. 173, at 191 (S.C.C.).

91 *Sinclair*, *supra*, note 82, at para. 86, *per* Binnie J., dissenting.

92 *Id.*, at paras. 124-130, *per* Fish and LeBel JJ., dissenting.

93 This was likely intentional. As Prof. Cameron has pointed out, Lamer J.'s attempt to limit s. 7's applicability to situations where the legal administration was engaged may have been his attempt to ensure that s. 7's net was not cast too wide. See Cameron, "From the *MVR* to *Chaoulli*", *supra*, note 31.

94 [2009] S.C.J. No. 30, 309 D.L.R. (4th) 581 (S.C.C.).

free from state interference with a decision to refuse a blood transfusion. Similarly, in *Gosselin v. Quebec (Attorney General)*[95] and *Charkaoui v. Canada (Citizenship and Immigration)*,[96] cases in which the section 15(1) equality claim appeared to dovetail with the section 7 claims, the Court kept the section 15(1) and section 7 analyses distinct, not permitting the equality dimension of the claim to permeate the section 7 analysis.

Gosselin involved a Charter challenge to Quebec's social assistance scheme, which set the base amount of welfare payable to persons under the age of 30 at roughly one third of the base amount payable to those 30 and over. The scheme was challenged under both section 7 and section 15(1) of the Charter. Justice L'Heureux-Dubé, in dissent, would have recognized a penumbra emanating from section 7 and section 15, holding that interpretations of section 15 can inform section 7 and vice versa.[97] The majority, however, rejected the idea of a section 7/section 15 penumbra, holding that section 7 — like the other legal rights — required a nexus to the administration of justice. Section 15 did not require such a nexus, making the two sections analytically separate.[98]

Charkaoui provides a good example where, if anywhere, a section 7/section 15 penumbra was ripe for recognition. In *Charkaoui*, the appellants challenged the *Immigration and Refugee Protection Act*'s security certificate scheme, which permitted the Minister to authorize the lengthy, if not indefinite, detention of the person named in the security certificate on the basis of reasonable grounds that the named person was a national security threat. The scheme applied only to non-citizens. The spectre of lengthy, indeterminate or indefinite detention, coupled with the differential treatment of non-citizens, triggered both section 7 and section 15 of the Charter. Because membership in a disadvantaged, discrete and insular group (non-citizens) was the impetus for a serious deprivation of liberty (indefinite detention) under the scheme, *Charkaoui* was an appropriate case in which to recognize the penumbra between section 7 and section 15 of the Charter.

Indeed, this is precisely how a majority of the British House of Lords analyzed a similar legislative scheme under the United Kingdom's *Terrorism Act 2000*.[99] In the majority of the Law Lords' analyses, the

---

95 [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429 (S.C.C.) [hereinafter "*Gosselin*"].

96 [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350 (S.C.C.) [hereinafter "*Charkaoui*"].

97 *Gosselin*, *supra*, note 95, at paras. 144-146, *per* L'Heureux-Dubé J.

98 *Id.*, at paras. 75-79, *per* McLachlin C.J.C.

99 *A and others v. Secretary of State for the Home Department*, [2004] UKHL 56, [2005] 2 A.C. 68 (H.L.).

equality and the liberty claims were conceptually fused. As Lord Nichols pointedly observed, "it is difficult to see how the extreme circumstances, which alone would justify such [prolonged or indefinite] detention, can exist when lesser protective steps apparently suffice in the case of British citizens suspected of being international terrorists".[100] The arbitrariness of using citizenship as a proxy for dangerousness rendered the legislation both overbroad and underbroad by "leaving British suspected terrorists at large … while imposing the severe penalty of indefinite detention on [foreign nationals]".[101] On this basis, the House of Lords declared the legislation to be incompatible with the U.K.'s international treaty obligations under the *European Human Rights Convention*.

Despite this precedent, the Supreme Court of Canada in *Charkaoui* kept the liberty and equality claims analytically distinct, analyzing section 7 issues without regard to the differential treatment of non-citizens and then going on to dismiss the section 15 claim in a terse four paragraphs.[102] In both *Gosselin* and *Charkaoui*, the inevitable effect of compartmentalizing the respective section 7 and section 15 claims was to weaken both arguments.

Other than the need to restrain the reach of section 7, it is unclear whether there is a sound doctrinal reason as to why the penumbra of the principles of fundamental justice should be limited to sections 7 to 14 of the Charter. Some commentators and jurists justify such a limit on the ground that section 7 and sections 8 to 14 fall under the "Legal Rights" heading of the Charter,[103] and therefore, their application is limited to contexts in which the "administration of justice" or an "adjudicative setting" is engaged. The Supreme Court's early decisions on section 7 appeared to give effect to this idea and suggested that section 7 applied only to deprivations of life, liberty or security of the person "that occur as a result of an individual's interaction with the justice system and its administration".[104] However, the Court later held that a nexus with the administration of justice may not be necessary to trigger section 7.[105] If a

---

[100] *Id.*, at para. 75, *per* Lord Nichols.

[101] *Id.*, at para. 43, *per* Lord Bingham.

[102] *Charkaoui*, *supra*, note 96, at paras. 129-132.

[103] See Peter Hogg, *Constitutional Law of Canada*, 5th ed., looseleaf (Scarborough, ON: Thomson Carswell, 2006), at 37-1 - 37-3, 47-5.

[104] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46, at para. 65 (S.C.C.).

[105] *Gosselin*, *supra*, note 95, at paras. 77-79. See also *Godbout v. Longueuil (City)*, [1997] S.C.J. No. 95, [1997] 3 S.C.R. 844 (S.C.C.); *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.) [hereinafter "*Chaoulli*"].

nexus to the administration of justice is not necessary to trigger section 7, then the penumbra of section 7 should not be limited to "Legal Rights" (sections 7 to 14) but should apply more broadly to other Charter provisions.

3. Principles of Fundamental Justice Based on Evolving Societal Values

Not all principles of fundamental justice that fall outside of the historical category can be explained by the penumbra theory. A third theory of the principles of fundamental justice — "founded upon the belief in the dignity and worth of the human person" and "on the rule of law"[106] — has emerged in the case law. This theory is the most expansive and thus potentially the most indeterminate. Principles of fundamental justice rooted in this theory are recognized where a section 7 right to life, liberty or security of the person outweighs a competing government interest. These principles of fundamental justice protect an evolving set of national values, which command widespread contemporary support, as reflected in legal developments and societal understandings that may change over time.

Saying that this third theory is founded upon human dignity is not to suggest that human dignity is unimportant under the first two theories. Respect for the inherent human dignity of all people is arguably *the* animating principle behind all Charter rights.[107] The difference is that under the first two theories, the principle of fundamental justice is anchored in precedent or is closely connected to pre-existing principles through the penumbra. Under this third theory, respect for human dignity and individual autonomy drives the analysis.

(a) The Expansive Era of the Evolving Rights Theory

R. v. Vaillancourt and *R. v. Martineau* are early examples of this evolving rights approach to the principles of fundamental justice.[108] Both cases involved challenges to the "constructive murder" provisions of the

---

[106] *MVR*, *supra*, note 6, at 503 (citations omitted).

[107] *Id.* (The principles of fundamental justice "have been recognized as essential elements of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person") (citations omitted).

[108] *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.) [hereinafter "*Vaillancourt*"]; *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.) [hereinafter "*Martineau*"].

Criminal Code. Ordinarily, murder requires proof of some kind of subjective intent to cause the death of the victim, as reflected in section 229(a) of the *Criminal Code*. The provisions challenged in *Vaillancourt* and *Martineau* defined homicide as murder in certain circumstances (such as when death was caused "while committing or attempting to commit" one of several enumerated offences) regardless of whether the Crown could prove the subjective mental state. In *Vaillancourt*, the Supreme Court held that this "relaxation" of the *mens rea* element of murder offended the principles of fundamental justice.[109]

While Lamer J., writing for the majority, relied on the section 7 right to be presumed innocent and the principle that criminal offences must contain a fault element,[110] it is a stretch to say that the *Vaillancourt/ Martineau* principles can be found in the penumbra of section 7. It is one thing to say that a criminal offence must contain a fault element; it is something different to say that Parliament cannot reduce the degree of fault necessary for a particular offence. Further, *Vaillancourt* and *Martineau* represented a clear break with a common law tradition. The concepts of "constructive murder" or "felony murder" had lengthy histories in the criminal law of Canada, the United States, Britain and other Commonwealth countries.[111] The reasoning in these cases is driven by an evolving rights theory focused on human dignity. The Court was concerned that those convicted of constructive murder would unduly suffer the "stigma" and the severe punishment reserved for the most serious offenders. As Lamer C.J.C. wrote, "in a free and democratic society that values the autonomy and free will of the individual, the stigma and punishment attaching to the most serious of crimes, murder, should be reserved for those who choose to intentionally cause death or who choose to inflict bodily harm that they know is likely to cause death".[112] The Court's holdings in *Vaillancourt* and *Martineau* are rooted in the idea that the Constitution protects the human dignity of all individuals, including those convicted of serious offences.[113]

R. v. Morgentaler is an important case in the development of the evolutionary approach to the principles of fundamental justice.[114]

---

[109] *Vaillancourt*, *id.*, at 654.

[110] *Id.*, at 651-56.

[111] See *id.*, at 647-50; *Martineau*, *supra*, note 108, at 662-64, *per* L'Heureux-Dubé J., dissenting.

[112] *Vaillancourt*, *id.*, at 645-46.

[113] *Martineau*, *supra*, note 108, at 675.

[114] *Morgentaler*, *supra*, note 10.

In *Morgentaler*, the Court famously struck down the *Criminal Code*'s abortion scheme. Chief Justice Dickson found that the legal abortion scheme was characterized by excessive delay and that because of byzantine procedures, access to therapeutic abortions was illusory.[115] He concluded that this scheme violated the woman's right to security of the person in a manner that offended the principles of fundamental justice because the Code's abortion scheme was "manifestly unfair".[116] Justice Beetz's decision was narrower than that of the Chief Justice but he ultimately also found that the Code's therapeutic abortion requirements were "manifestly unfair".[117]

Neither Chief Justice Dickson nor Beetz J. provides any authority for the proposition that a "manifestly unfair" law offends the principles of fundamental justice. The principle that laws should not be "manifestly unfair" cannot be traced to our common law heritage, nor does this principle fit within the penumbra of section 7. Nevertheless, these opinions represent important building blocks in developing the principle that laws must not be arbitrary, overbroad or grossly disproportionate infringements of life, liberty or security of the person (see *infra*, at 368-73).

Justice Wilson's concurring opinion was not grounded in the "manifest unfairness" of the abortion procedure. She affirmed a new principle of fundamental justice, anchored in human dignity and autonomy, which serves to protect a woman's substantive right to terminate her pregnancy, free from state interference.[118] This opinion is the high watermark in our third theory of the principles of fundamental justice, which focuses on evolving societal values and normative judgments about what rights, interests and values should be protected in a free and democratic society.

(b) The Rodriguez/Malmo-Levine *Test*

Morgentaler was a watershed moment in part because it recognized principles rooted neither in pre-Charter law nor in the section 7 penumbra. But the Court discovered early on that this third approach was potentially limitless. In *Rodriguez v. British Columbia (Attorney General)*,[119] the Court

---

115 *Id.*, at 53, 69.
116 *Id.*, at 72-73.
117 *Id.*, at 82.
118 *Id.*, at 166.
119 [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (S.C.C.) [hereinafter "*Rodriguez*"].

erected strictures around the evolving rights theory to guard against this risk of indeterminacy. Ms. Rodriguez, who suffered from amyotrophic lateral sclerosis and whose condition was rapidly deteriorating, had applied for a court order that section 241(b) of the *Criminal Code*, which prohibits physician-assisted suicide, violated her Charter rights. The appellant argued that it is a principle of fundamental justice that the human dignity and autonomy of individuals be respected, and that to subject her to needless suffering is to rob her of that dignity. A majority of the Court rejected her claim. Justice Sopinka held that it was "unquestioned" that "respect for human dignity is one of the underlying principles upon which our society is based".[120] However, human dignity was not a free-standing principle of fundamental justice.[121]

In so holding, the majority adopted the following framework to identify the principles of fundamental justice:

> … A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required. Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles.[122]

In *R. v. Malmo-Levine*, and in cases following it, the Supreme Court restated this framework from *Rodriguez* as a three-part test, requiring the rights-holder to establish the following before a court will recognize a principle of fundamental justice:

(1) there is a legal principle;

(2) there is a societal consensus that the rule or principle is fundamental to the way in which the legal system ought to fairly operate; and

---

[120] *Id.*, at 592.

[121] *Id.*; see also *Blencoe*, *supra*, note 3, at para. 97 ("While notions of dignity and reputation underlie many *Charter* rights, they are not stand-alone rights that trigger s. 7 in and of themselves").

[122] *Rodriguez*, *supra*, note 119, at 590-91.

(3) the principle is capable of being identified with sufficient precision so as to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.[123]

The purpose of the *Rodriguez/Malmo-Levine* test was to prevent the principles of fundamental justice under the evolving rights theory from becoming limitless. Still, even with the adoption of the *Rodriguez/Malmo-Levine* test, indeterminacy and unpredictability persist, as it remains necessary to identify whether the proposed "principle" was in fact a "*legal* principle". Further, as commentators have noted, determining whether there is "sufficient consensus" that a principle is "fundamental to the way in which the legal system ought to fairly operate" is even more difficult to understand and apply.[124]

Owing to these difficulties, the recognition of new principles of fundamental justice under the *Rodriguez/Malmo-Levine* test has been relatively rare.[125] The test is set up for failure. Indeed, where the Court has wanted to recognize a right under the evolving rights theory, it has tended to bypass the *Rodriguez/Malmo-Levine* test altogether in favour of a more flexible approach. For example, in *United States v. Burns* (which pre-dates *Malmo-Levine* but was decided after *Rodriguez*), the Supreme Court held that the extradition of an accused to a death penalty jurisdiction would violate the principles of fundamental justice unless Canada received assurances that prosecutors would not seek the death penalty.[126] This holding was not anchored in history or in the section 7 penumbra or justified under the methodology from *Rodriguez*. Rather, it was based on policy considerations that took into account evolving standards of decency and the collective abhorrence toward the death penalty in Canada and in other democratic nations.[127]

The Supreme Court's decision in *R. v. D. (B.)*[128] stands out as an exception in which the application of the *Rodriguez/Malmo-Levine* test

---

[123] *R. v. Malmo-Levine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571, at para. 113 (S.C.C.) [hereinafter "*Malmo-Levine*"]; *Canadian Foundation for Children, Youth and the Law v. Canada*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76, at para. 8 (S.C.C.) [hereinafter "*Canadian Foundation for Children*"]; *R. v. D. (B.)*, [2008] S.C.J. No. 25, [2008] 2 S.C.R. 3, at para. 46 (S.C.C.) [hereinafter "*D. (B.)*"].

[124] See Stewart, *supra*, note 22, at 107-108; Hogg, *supra*, note 5, at 199-201.

[125] See, *e.g.*, *Canadian Foundation for Children, supra*, note 123 (rejecting the idea that "best interests of the child" was a principle of fundamental justice).

[126] *United States v. Burns*, [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283, at para. 132 (S.C.C.).

[127] *Id.,* at paras. 85-120.

[128] *Supra*, note 123.

has led to the recognition of a new principle of fundamental justice under the evolving rights approach. In *R. v. D. (B.)*, the Court considered the constitutionality of a reverse onus provision of the *Youth Criminal Justice Act* ("YCJA").[129] Justice Abella, writing for the majority, recognized a new principle of fundamental justice that young persons were entitled to a "presumption of diminished moral culpability" and struck down the provision.[130] Yet, the majority's conclusion that there is a societal consensus that this principle is fundamental to our legal system was based less on democratic consensus and more on the majority's reasoned judgment — taking into account the purposes of the YCJA, international human rights norms, and scientific literature about the cognitive development of adolescents — that young persons are less morally blameworthy than adults.[131]

The majority and dissenting opinions in *D. (B.)* show that there remains considerable confusion surrounding the *Rodriguez/Malmo-Levine* test, particularly as it relates to the second prong — *i.e.*, a societal consensus that the rule or principle is fundamental to the way in which the legal system ought to fairly operate. The 5-4 majority in *D. (B.)* understood "societal consensus" to mean what the reasonable person — fully informed about our legal system and history and the evolving consensus in democratic legal systems around the world and in international law — would believe is fundamental to the way in which the legal system ought to fairly operate. By contrast, Rothstein J., writing for the dissent, took "societal consensus" to mean popular opinion in Canada. He wrote that there was "no societal consensus that such a presumption [of diminished moral blameworthiness and youth sentences] is a vital component of our notion of justice".[132] This conclusion was based on "[s]tudies on public perceptions of youth crime", which suggested that "the prevailing views of the public are that youth crime is rising, particularly violent youth crime, and that young offenders are handled too leniently by youth justice courts".[133] Justice Rothstein went on to consider the ebb and flow of youth criminal justice from a historical perspective and the perceived public concern with youth

---

129 S.C. 2002, c. 1.
130 *D. (B.)*, *supra*, note 123, at paras. 68-69.
131 *Id.*, at paras. 47-69.
132 *Id.*, at para. 131, *per* Rothstein J.
133 *Id.*

violence, which led to successive changes to the *Young Offenders Act* and its eventual repeal in favour of the YCJA.[134]

The majority and the dissent in *D. (B.)* speak past each other. Both purport to be applying the *Rodriguez/Malmo-Levine* test, but apply starkly different versions of the "societal consensus" prong of the test. Neither approach is entirely satisfactory. On one hand, the plain meaning of the term "societal consensus" would suggest popular opinion as reflected in the dissenting approach. On the other hand, how does the majority of Canadian society (most of whom are non-lawyers) know what is and isn't a fundamental legal principle? It is doubtful that the vast majority of our non-lawyer population has even heard of many of those principles that are well entrenched as section 7 principles of fundamental justice. The notion that there is a true democratic "consensus" that these principles are fundamental to our legal system is a legal fiction. Moreover, the notion that popular opinion should determine the content of a constitutional right is oxymoronic. As Lamer J. has noted, "[t]he *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority".[135] From this perspective, an approach to "societal consensus" based on what the enlightened, reasonable person would believe is the more workable standard.

Given the relatively few cases in which new principles of fundamental justice are recognized under the evolving rights theory, it is difficult to speculate as to which conception of "societal consensus" will prevail. But a recent decision of the British Columbia Court of Appeal suggests support for the enlightened, reasonable person approach. In *Federation of Law Societies of Canada v. Canada (Attorney General)*,[136] the Federation challenged certain Regulations made under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*,[137] which required lawyers in certain circumstances, who receive or pay funds on behalf of clients, to keep records of financial transactions. That information can then be accessed by Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC") and law enforcement agencies. The chambers judge found that this regime engaged the liberty interests of clients and

---

[134] *Id.*, at paras. 132-138.

[135] *R. v. Collins*, [1987] S.C.J. No. 15, [1987]1 S.C.R. 265, at 282 (S.C.C.).

[136] [2013] B.C.J. No. 632, 41 B.C.L.R. (5th) 283 (B.C.C.A.) [hereinafter "*Federation of Law Societies*"].

[137] S.C. 2000, c. 17.

lawyers alike in a manner that was inconsistent with the principles of fundamental justice because "the impugned provisions infringe the solicitor-client relationship insofar as they provide that lawyers are required to obtain and retain information about their clients which can be accessed by FINTRAC and provided to law enforcement agencies", thereby turning lawyers' offices "into archives for the use of the prosecution".[138]

The B.C. Court of Appeal upheld the chambers judge's decision but on different grounds. While solicitor-client privilege was of course a principle of fundamental justice, it was not directly engaged by this legislation. The Court held instead that the regime violated the principle of the "independence of the Bar". The Court of Appeal acknowledged that this principle was not a "settled principle of fundamental justice" but applied the *Rodriguez/Malmo-Levine* framework and concluded that it was "fundamental to the way in which the legal system ought fairly to operate".[139] The Court gave no pretense of searching for a "societal consensus", but instead focused on the strong language from Supreme Court of Canada precedents and a treatise on *The Rule of Law* that extols the virtues of an Independent Bar.[140] It will be interesting to see whether the Supreme Court adopts the Court of Appeal's approach, particularly because the independence of the Bar may be more appropriately categorized as an unwritten constitutional principle (see *supra*, at 355-56) rather than a principle of fundamental justice under section 7.[141]

(c) The Proportionality Triumvirate

Due in part to the difficulty of establishing new principles under the *Rodriguez/Malmo-Levine* test, evolving rights theory cases have tended in recent years to coalesce around a set of principles of fundamental justice rooted in the concept of proportionality: overbreadth, arbitrariness and gross disproportionality (the "proportionality triumvirate"). A law is "arbitrary" if it bears no relation to, or is inconsistent with, the state interest that lies behind the legislation.[142] A law is "grossly disproportionate" if the state action or legislative response to a problem is

---

[138] *Federation of Law Societies of Canada v. Canada (Attorney General)*, [2011] B.C.J. No. 1779, 339 D.L.R. (4th) 48, at paras. 112, 144 (B.C.S.C.).

[139] *Federation of Law Societies*, *supra*, note 136, at paras. 105, 107.

[140] *Id.*, at paras. 107-113.

[141] See Roy Millen, "The Independence of the Bar: An Unwritten Constitutional Principle" (2005) 84 Can. Bar Rev. 107.

[142] *Chaoulli*, *supra*, note 105, at para. 232, *per* Binnie and LeBel JJ.

so extreme as to be disproportionate to any legitimate government interest.[143] A law is "overbroad" if the means chosen by the State to achieve an objective "are broader than necessary to accomplish that objective".[144] The concepts of arbitrariness, overbreadth and gross disproportionality closely resemble the three aspects of proportionality in the section 1 *Oakes* test: arbitrariness is analogous to "rational connection"; overbreadth is analogous to "minimal impairment"; and gross disproportionality is analogous to the weighing of salutary versus deleterious effects.[145] The proportionality triumvirate's similarity to the *Oakes* test may explain why courts have been receptive to it and why litigants invoking the proportionality triumvirate have achieved some success in recent cases.

The proportionality triumvirate differs from early approaches to the evolving rights theory by focusing on the means that the government has chosen rather than the ends. Courts are not drawn into making normative value determinations about the merits of government policy (*e.g.*, is it good policy to protect a woman's right to terminate her pregnancy?) but are instead asked to determine whether the government has pursued its policy in a proportionate manner (*e.g.*, is the legislation governing abortions fair or arbitrary?). The proportionality triumvirate serves the function of the evolving rights theory by expanding section 7 beyond historically protected rights and their penumbras, but answers the charge of indeterminacy by focusing on the means rather than the ends.

The origins of the proportionality triumvirate are unclear. They are not historical. As noted above, prior to 1982, there was no prohibition preventing Parliament or the legislature from passing laws that were disproportionate to the life, liberty or security interests affected by the legislation. Nor is the principle of proportionate law-making derived from the section 7 penumbra because the section 7 penumbra requires a close connection to a pre-existing principle. To the extent that the proportionality triumvirate fits into any of our categories, it belongs in the category of evolving rights based on concepts of human dignity and

---

[143] *Malmo-Levine*, *supra*, note 123, at para. 143.

[144] *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761, at 792-93 (S.C.C.).

[145] *Oakes*, *supra*, note 60, at 139; *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835, at 839 (S.C.C.) (the *Oakes* test "should be rephrased to recognize in the third step of the proportionality branch that there must be a proportionality not only between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, but also between the deleterious and the salutary effects of the measures").

individual autonomy, having first emerged in *Morgentaler* under the rubric of "manifest unfairness".[146]

Although the Court's section 7 jurisprudence does not explicitly draw the connection between human dignity and proportionality, that connection is explained in the section 1 context in *R. v. Oakes*. In explaining the rationale behind the section 1 proportionality ("*Oakes*") test, Dickson C.J.C. explained that:

> … The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.[147]

Section 7's proportionality triumvirate should be understood in a similar vein. In the post-Charter era, as citizens grew from subjects into constitutionally protected rights-holders, the Constitution now demands that the Government treat the people as ends rather than means. Accordingly, government law-making that trenches upon life, liberty or the security of the person must be proportionate to the ends sought.

Efforts to fit section 7 claims within the proportionality triumvirate have yielded some success. In *Chaoulli v. Quebec (Attorney General)*, a 4-3 majority struck down Quebec's prohibition on private insurance for health care services as incompatible with the Quebec Charter.[148] Three members of the majority held that the prohibition was arbitrary and thus a violation of section 7 of the Canadian Charter because its purpose (the protection of the public health care system) bore no relation to the means chosen (a prohibition on private insurance).[149]

In *Canada (Attorney General) v. PHS Community Services Society*,[150] the applicants challenged the Minister of Health's decision to withdraw an

---

146 See *supra*, Part II.3(a).
147 *Oakes*, *supra*, note 60, at 136.
148 *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12.
149 *Chaouilli*, *supra*, note 105, at para. 153.
150 *PHS*, *supra*, note 12.

exemption that had been awarded to Insite, a "safe injection site", under a statutory discretion. Insite provided clean needles and a safe environment for users of unlawful intravenous drugs, with a view to preventing the spread of infectious disease caused by re-use of needles and to providing health care for drug users. The evidence in the record showed that Insite had reduced the injection of drugs in public as well as the number of overdose deaths. Further, there was no evidence that Insite had increased the rate of crime. In light of the evidence, the decision to refuse to continue Insite's exemption was arbitrary because the exemption "does not undermine the objectives of public health and safety, but furthers them".[151] The Minister's action was also grossly disproportionate in its effects. Insite's benefits were proven; it saved lives. On the other hand, the benefit that the government might achieve from denying the exemption was speculative.[152]

Chaoulli and *PHS* are remarkable for a number of reasons (some of which are discussed by my colleagues in this volume).[153] But they are also remarkable because of what they tell us about the trajectory of the evolving rights category of section 7 principles of fundamental justice. The evolving rights approach has moved from an *individual*-centric mode of analysis, rooted in human dignity, to a *state*-centric mode of analysis, which focuses on whether the Government has engaged in proportionate law-making. The section 7 claims in *Chaoulli* and *PHS* were framed as challenges to government conduct: *i.e.*, that the government had acted unlawfully by enacting overbroad, arbitrary and grossly disproportionate laws. In the early (pre-*Rodriguez*) days of the evolving rights theory, those claims might have been framed as positive rights claims. In an earlier time, the *Chaoulli* applicants might have focused on establishing that the prohibition on private health insurance interfered with their right to choose how to access health care — a choice that is tied intimately to human dignity and self-fulfilment. Meanwhile, in *PHS*, the claim could have focused on how the government's conduct interfered with the applicant's right of access to safe conditions, an idea rooted in the belief that drug users are also deserving of respect and that safe injection sites are an important means of protecting them from harm and preserving their human dignity. Such claims would have been similar to

---

[151] *Id.*, at para. 131.

[152] *Id.*, at para. 133.

[153] See Alana Klein, "The Arbitrariness in 'Arbitrariness' (and Overbreadth and Gross Disproportionality): Principle and Democracy in Section 7 of the Charter", in this volume.

other early evolving rights approaches, such as Wilson J.'s concurrence in *Morgentaler* and the dissent in *Rodriguez*. But in more recent years, particularly after the entrenchment of the *Rodriguez/Malmo-Levine* test, courts have been unreceptive to these affirmative claims grounded explicitly in human dignity. They have instead found claims couched as challenges to government's overbroad, arbitrary or grossly disproportionate laws to be more palatable.

Two "do-over" Charter challenges — *Bedford v. Canada*[154] and *Carter v. Canada*[155] — underscore this point. In *Bedford*, the applicants challenged the constitutionality of three provisions of the *Criminal Code* — the bawdy-house prohibition, the "living-off-the-avails" prohibition and the public solicitation prohibition — that formed the core of Parliament's response to prostitution.[156] These were the same sections challenged in the 1988 *Prostitution Reference*.[157] In the *Prostitution Reference*, a majority of the Supreme Court of Canada rejected the Charter challenge.[158] The *Prostitution Reference* arguments in favour of striking down the impugned provisions were grounded in the sex worker's right to freedom of expression and the section 7 principle of fundamental justice against vague laws. A majority of the Supreme Court rejected those claims.[159] The *Bedford* applicants took those arguments and recast them as arguments about proportionate law-making, arguing that the impugned provisions were overbroad, arbitrary and grossly

---

[154] *Bedford v. Canada (Attorney General)*, [2012] O.J. No. 1296, 109 O.R. (3d) 1 (Ont. C.A.), appeal heard and reserved June 13, 2013, [2012] S.C.C.A. No. 159 (S.C.C.) [hereinafter "*Bedford*"].

[155] *Carter v. Canada (Attorney General)*, [2012] B.C.J. No. 1196, 287 C.C.C. (3d) 1 (B.C.S.C.) [hereinafter "*Carter*"].

[156] The applicants challenged ss. 210, 212(1)(j) and 213(1)(c). Section 210 prohibits the operation of common bawdy-houses. This prevents prostitutes from offering their services out of fixed indoor locations such as brothels, or even their own homes. Section 212(1)(j) prohibits living on the avails of prostitution. This prevents anyone, including but not limited to pimps, from profiting from another's prostitution. Section 213(1)(c) prohibits communicating for the purpose of prostitution in public. This prevents prostitutes from offering their services in public, and particularly on the streets.

[157] *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123 (S.C.C.) [hereinafter "*Prostitution Reference*"].

[158] Admittedly, the Charter right primarily at issue in the *Prostitution Reference* was s. 2(b), whereas the focus in *Bedford* is s. 7. Given that the bulk of the analytical work in both cases is done by applying a proportionality test (the s. 1 *Oakes* test in the *Prostitution Reference* and gross disproportionality and overbreadth as principles of fundamental justice in *Bedford*), the fact that the two cases involved different triggering sections (s. 2(b) versus s. 7) does not undermine the comparison.

[159] *Prostitution Reference*, *supra*, note 157, at 1143.

disproportionate in relation to the ends sought to be achieved through the legislation.[160] Notwithstanding the *Prostitution Reference* precedent, the Ontario Court of Appeal agreed in part with the application judge and held that both the bawdy house and living-off-the-avails provisions were overbroad and grossly disproportionate.[161]

The British Columbia Supreme Court's decision in *Carter v. Canada* is another effective illustration of the move from a human dignity-centric approach to a state-centric approach grounded in the proportionality triumvirate. *Carter* is in many respects a do-over of *Rodriguez*, challenging the *Criminal Code* prohibition on assisted suicide. But whereas the applicant in *Rodriguez* grounded her Charter claim in an explicit appeal to respect human dignity, the applicant in *Carter* reframed those arguments as claims based in the proportionality triumvirate of the principles of fundamental justice.[162] Notwithstanding *Rodriguez*, the British Columbia Supreme Court agreed that the impugned provision was overbroad and grossly disproportionate to the ends sought.[163] The British Columbia Court of Appeal recently reversed that decision,[164] but a forceful dissent from Finch C.J.B.C., and the ongoing public controversy surrounding assisted suicide, suggest that the Supreme Court of Canada is likely to have the final word in this case.

Scholars of constitutional law have approached the proportionality triumvirate with some suspicion.[165] Their concerns are not entirely unfounded. While Lamer J. had an expansive vision of the principles of fundamental justice, even he cautiously emphasized that the principles of fundamental justice must not intrude into the realm of "policy matters".[166] The argument that the courts applying the proportionality triumvirate are not second-guessing Parliament's policy choices but rather measuring their means is only a partial response. As *Bedford* and *Carter* show, section 7 challenges that previously called on the courts to recognize new positive section 7 rights can often be reformulated as claims grounded in proportionality. The courts' task will be to separate those genuine proportionality-based challenges from those that merely seek to second-guess the government's policy decisions. On balance, however, the

---

160 *Bedford*, *supra*, note 154, at paras. 198-212.
161 *Id.*, at paras. 204-213, 243-256.
162 *Carter*, *supra*, note 155, at paras. 974-985.
163 *Id.*, at paras. 1371, 1378.
164 *Carter v. Canada (Attorney General)*, [2013] B.C.J. No. 2227 (B.C.C.A.).
165 Hogg, *supra*, note 5, at 204-209; Klein, *supra*, note 2, at 65-72.
166 *MVR*, *supra*, note 6, at 503.

emergence of the proportionality triumvirate is a welcome development to the evolutionary approach to the principles of fundamental justice, which had been rudderless since *Rodriguez*.

III. Conclusion

The Supreme Court of Canada has never expressly adopted any of the three theories discussed above, but each has figured prominently in the Court's reasoning throughout the Charter era. Although each of these three theories is consistent with the Charter's transformative purpose, each also serves a different function. The historical theory posits that the purpose of section 7 is to ensure that the enumeration of certain rights in the text of the Charter does not foreclose the recognition of other principles that have historically been fundamental to the way our legal system operates. The penumbra theory is based on a similar purpose but is more expansive. It posits that reliance solely on the historical approach is inconsistent with the living tree Constitution that our courts have so assiduously watered and would leave gaps in our constitutional framework. The penumbra theory thus serves a gap-filling function, recognizing new principles of fundamental justice where those new principles are necessary to breathe life and meaning into existing principles. The evolving rights theory posits that section 7 — like the Charter more generally — serves primarily to ensure that the state respects individual human dignity and autonomy. Under this theory, the principles of fundamental justice must be moored to their primary purpose: protecting the human dignity of Canadian citizens. While the evolving rights theory in more recent years has coalesced around the proportionality triumvirate of arbitrariness, overbreadth and proportionality, these principles remain rooted in the concept of human dignity.

The purpose of this paper was not to endorse any one of these theories, but rather to identify them so that they may be helpful to future litigants. Understanding the animating principles behind section 7 is necessary to marshal purposive, principled arguments, especially where the rights-holder seeks recognition of a new section 7 principle of fundamental justice. Each of these theories can serve rights-holders' interests when invoked in the appropriate context.

Rights claimants should not overlook the historical principles of fundamental justice. While this category is limited because it depends on anchoring the principle in pre-Charter precedent, there is an obvious advantage if the rights claimant can ground her claim in the historically

based principles of fundamental justice: proof of the right's existence requires only identifying a historical precedent. Further, as in the cases described above, where a principle of fundamental justice is historically based, the rights-holder may be entitled to a more robust remedy.

The penumbra theory is also a useful tool to litigants because it empowers litigants to assert new rights while still being soundly anchored in established principles. It was invoked frequently during the 1990s. However, the failure of the Supreme Court in its early years to more explicitly endorse the penumbra theory may have led to some lost opportunities for meritorious rights claimants. In cases such as *Singh* and *Sinclair*, which fit nicely within the penumbra framework, the penumbra mode of analysis was non-existent in the majority's opinion. If the penumbra theory had been expressly endorsed in the Court's earlier jurisprudence, those Charter challenges might have succeeded. Still, the penumbra theory remains promising — particularly in the criminal procedure context where it has been most frequently invoked — because it occupies a conceptual middle ground: it is dynamic and flexible enough to allow new, previously unrecognized principles of fundamental justice to emerge but also sufficiently anchored to the text of sections 7 to 14 of the Charter to avoid the critics' charge that section 7 after *MVR* took a vague, indeterminate and unprincipled turn.

The third approach, based on notions of evolving rights and societal values, was originally the most expansive approach to the principles of fundamental justice. The introduction of the *Rodriguez/Malmo-Levine* test has substantially limited the recognition of new principles of fundamental justice under this theory. It is hard to see a return to the expansive evolving rights approach that we saw in *Vaillancourt* and *Martineau* and the *Rodriguez* and *Gosselin* dissents. In recent years, rights claimants in this third category have relied on the proportionality triumvirate — arbitrariness, gross disproportionality and overbreadth. In light of the Court's recent decisions in *Chaoulli* and *PHS*, and the recent successes in the lower courts in *Bedford* and *Carter*, litigants seeking recognition of rights rooted neither in historical precedent nor the section 7 penumbra would be well-advised to focus their efforts on fitting their section 7 Charter challenges within the proportionality triumvirate, which appear robust enough to accommodate diverse rights claims.